No. 86-606

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

JAY NELL LOCKE,

Petitioner,

v.

MESA PETROLEUM COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. HOULD
HOULD, DONNELLY & WESTLING
220 E. Forsyth Street
Jacksonville, Florida 32202
(904) 356-2341

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SUCCESSOR JUDGE MAY ENTER A SUMMARY JUDGMENT AND DECIDE A RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT WHEN THE PRIOR JUDGE HAD ANNOUNCED, IN OPEN COURT AND ON THE RECORD, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THEN ALLOWED A PROFFER OF TESTIMONY AND EVIDENCE IN SUPPORT OF THE RULE 60(b) MOTION BUT DIED BEFORE RENDERING A RULING ON THE RULE 60(b) MOTION.

II. WHETHER, AT THE TIME THE CONSTRUCTIVE TRUST AROSE, AN ESTATE BY THE ENTIRETIES EXISTED.

PARTIES TO THE PROCEEDINGS BELOW

Jay Nell Locke

Coy Aldridge Locke

C. John Coniglio

Mesa Petroleum Company
Affiliates:

Mesa Limited Partnership
Mesa Operating Limited Partnership

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals is recorded at *Locke v. Mesa Petroleum Company,* 787 F.2d 1484 (11th Cir. 1986). Copies of the opinion of the Court of Appeals and the decision of the District Court are contained in the appendix to the Petitioner's Petition for Writ of Certiorari.

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JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's jurisdictional statement. The jurisdiction of this Court is invoked under 28 USC Section 1254.

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APPLICABLE PROVISIONS OF LAW

Rules 52, 56 and 63, Federal Rules of Civil Procedure.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the Court.

Rule 56. Summary Judgment

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 63. Disability of a Judge

If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

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STATEMENT OF THE CASE

This case involves consolidated actions, *Mesa Petroleum Company v. C. John Coniglio, C. A. Locke, Jr., etc.*, Case No. 75-28-Civ-Oc (herein "75-28"), and *Mesa Petroleum Company v. J. Nell Locke and C. John Coniglio*, Case No. 82-85-Civ-Oc (herein "82-85").

The 75-28 case involved certain promissory notes given to MESA PETROLEUM COMPANY ("MESA"),

by C. JOHN CONIGLIO ("CONIGLIO"), and Petitioner's husband, COY ALDRIDGE LOCKE, JR., ("C. A. LOCKE"). The suit was filed July 1, 1975, and contained six counts: Count I on CONIGLIO's note; Count II on C. A. LOCKE's note; Count III for joint losses; and, Count IV, V and VI for fraud in the transfer of certain real property in Sumter County, Florida. Trial was held before the Honorable Charles R. Scott, sitting without a jury, in October, 1977, and on October 13, 1978, the trial court entered a final judgment in favor of MESA against the defendants, CONIGLIO and C. A. LOCKE. The judgment set forth, *inter alia*, that MESA was to recover $159,290.67 from C. A. LOCKE and an identical amount from CONIGLIO, together with an award of costs plus interest from the date of the judgment. The judgment also stated that the Court would, in a separate order, set aside a conveyance of real property from C. A. LOCKE and his wife, Petitioner JAY NELL LOCKE ("J. N. LOCKE"), to CONIGLIO and his wife that was determined by the trial court to have been made with the intent of defrauding MESA.

On December 26, 1978, the trial court entered an order awarding MESA attorney's fees in the amount of $50,000.00. However, the court abandoned the idea of setting aside the fraudulent conveyance and instead created a constructive trust. The trust *res* consisted of two distinct interests in the four tracts of land involved in the fraudulent conveyance: first, the interest transferred by C.A. LOCKE and J. N. LOCKE, his wife, to CONIGLIO and his wife; and, second, the interest of CONIGLIO in those same four tracts. The trust was to

be extinguished as to each interest as the liability of each defendant was satisfied. The court named defendant CONIGLIO, who held record title, as trustee.[1]

The Court's findings, awards and the creation of the constructive trust were affirmed by the Fifth Circuit Court of Appeals in *Mesa Petroleum Company v. Coniglio,* 629 F.2d 1022 (5th Cir. 1980). On February 20, 1981, CONIGLIO satisfied the judgment as to his individual liability and a release reflecting his individual discharge was filed. However, CONIGLIO's liabilities and obligations as trustee under the constructive trust were specifically reserved and excluded from the release.

On August 31, 1979, C. A. LOCKE filed a voluntary petition in bankruptcy (*in re: Coy Aldridge Locke, Jr., d/b/a/ C & L Farms,* Case No. 79-541-Bk-J In the United States District Court for the Middle District of Florida). In the bankruptcy action, MESA was ultimately awarded $1,056.08 as a general unsecured creditor. On June 11, 1980, C. A. LOCKE was granted a personal discharge in bankruptcy. Following C. A. LOCKE's personal discharge in bankruptcy, MESA filed its motion for order clarifying CONIGLIO's duties as constructive trustee, requesting that the Court instruct CONIGLIO to liquidate the trust to satisfy the balance of the judgment entered by the trial court against C. A. LOCKE.

At the hearing on MESA's motion for order clarifying CONIGLIO's duties, C. A. LOCKE filed his suggestion of bankruptcy, arguing essentially that the requested

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[1] Prior to the Court's orders of October 13, 1978, and December 26, 1978, the marriage of Defendant CONIGLIO was dissolved and Mrs. Coniglio conveyed all of her right, title and interest in the four tracts to CONIGLIO, individually.

relief under the constructive trust was barred under the applicable bankruptcy rules as a result of his personal discharge being granted. The Court was called upon to determine whether C. A. LOCKE's personal discharge affected MESA's interest in the four tracts of land forming the *res* of the constructive trust as it related to C. A. LOCKE. At the request of the trial judge, the parties filed various memoranda of law and evidence in support of their positions. In its order dated January 25, 1982, the trial court held that C. A. LOCKE's personal discharge in bankruptcy did not affect MESA's interest in the trust property; consequently, the Court ordered defendant CONIGLIO, as constructive trustee, to conduct a sale of the trust property for MESA's benefit. *Mesa Petroleum Company v. Coniglio,* 16 B.R. 1015 (M.D.Fla. 1982). That order set forth a very detailed and considered review of the facts of the bankruptcy case in connection with C. A. LOCKE's defense as well as the claim of the LOCKE's to an entireties interest in one of the tracts of land in the trust *res*. Essentially, the Court held that MESA's beneficial interest in the trust *res* arose out of a transaction prior to the creation of the entireties interest of C. A. LOCKE and Petitioner J. N. LOCKE, his wife. The order of January 25, 1982, was not appealed.

Before the sale of the trust *res* was conducted, in April, 1982, Petitioner J. N. LOCKE collaterally challenged the Court's ruling in the 75-28 case by filing a state court action in the Circuit Court of the Fifth Judicial Circuit, in and for Sumter County, Florida, case Number 82-125-CA, naming CONIGLIO as the defendant

therein, seeking to enjoin the sale of the real property. MESA was not joined as a party defendant in the state court litigation.

Upon learning of the filing of the state court action, MESA filed the 82-85 case in the United States District Court to enjoin Petitioner J. N. LOCKE and CONIGLIO from proceeding with the state court action and for a declaratory judgment that the rights of MESA to the property in the constructive trust are superior to the rights, if any, of the Petitioner J. N. LOCKE. The district judge in the 82-85 case was the Honorable Charles R. Scott, the same judge who presided in the 75-28 case. MESA simultaneously filed a motion to consolidate the 82-85 case with the 75-28 litigation. On MESA's motion, the trial judge entered a temporary restraining order restraining the state court proceedings and consolidating the two actions. Thereafter, the Court entered its preliminary injunction enjoining J. N. LOCKE and CONIGLIO from proceeding further in the state court litigation.

Following a period of discovery and an extensive pretrial conference, J. N. LOCKE and MESA submitted pretrial memoranda relating to the issues, including, as requested by Judge Scott, the issues of preclusion and laches. On December 6, 1982, Judge Soett announced his findings of fact and conclusion of law, ruling that the defendant J. N. Locke was barred or precluded from relitigating, in the 82-85 case, the issues previously raised and lost by her husband C. A. LOCKE in case 75-28.[2]

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[2] The appendix to Petitioner's brief includes the revelant portions of Judge Scott's rulings. See, pages 3-7, Order and Summary Final Judgment.

J. N. LOCKE then orally moved for relief from the order of preclusion as well as the earlier orders and judgments entered in 75-28 pursuant to Rule 60 (b)(4) and 60 (b)(6), Federal Rules of Civil Procedure. The Court allowed the parties to proffer testimony, the deposition of J. N. LOCKE and various documentary evidence in support of and in opposition to the Rule 60 motions. Following the hearing the parties submitted memoranda of law on the Rule 60 motions. Unfortunately, Judge Scott, died without having ruled on J. N. LOCKE's Rule 60 motions. At the time, the Court also had various other motions under consideration including MESA's request that a sale of the trust *res* be scheduled, that CONIGLIO be required to correct certain defects he had created in the record title to the property, that CONIGLIO be held in contempt of court for ignoring the court's orders, and that MESA be awarded further attorney's fees.

On July 8, 1983, following the reassignment of the case to the Honorable John H. Moore, II, United States District Judge, MESA filed its motion for entry of judgment which motion, on March 12, 1985, was granted. Likewise, the Court denied the Rule 60(b) motions and granted the other relief requested by MESA. The Court's March 12, 1985, Order and Summary Final Judgment was the subject matter of the appeal to the Court of Appeals for the Eleventh Circuit.

Respondent further refers this Honorable Court to the Order and Summary Final Judgment entered by the District Court and the opinion of the Eleventh Circuit Court of Appeals, (both of which are contained in the appendix to Petitioner's brief) for a concise recitation of the facts material to the consideration of the questions presented.

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ARGUMENT IN OPPOSITION TO GRANTING WRIT

I. WHETHER A SUCCESSOR JUDGE MAY ENTER A SUMMARY JUDGMENT AND DECIDE A RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT WHEN THE PRIOR JUDGE HAD ANNOUNCED, IN OPEN COURT AND ON THE RECORD, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THEN ALLOWED A PROFFER OF TESTIMONY AND EVIDENCE IN SUPPORT OF THE RULE 60(b) MOTION BUT DIED BEFORE RENDERING A RULING ON THE RULE 60(b) MOTION.

It is evident that, but for the Petitioner's Rule 60(b) motions, the original court's bench ruling (See Pages 3-7, Order and Summary Final Judgment entered by the District Court, appendix to Petitioner's Brief) would have set forth a sufficient factual and legal basis for entry of final judgment. Such a dispositive holding would enable a successor judge to enter judgment in the action for the plaintiffs, Rule 63 and 52(b), Federal Rules of Civil Procedure; *Mikah Indian Tribe v. Moore*, 93 F.Supp. 105 (Wash. 1950), reversed on other grounds, 192 F.2d 224 (9th Cir. 1951); *The Del-Mar-Va*, 56 F.Supp. 743 (E.D.Va. 1944).

It is apparent that the original trial judge, Judge Scott, had already drafted an order which he read for the record in open court. The Petitioner has not cited any authority showing that the taking of evidence pursuant to a subsequent Rule 60(b) motion, after the oral pronouncement of findings of fact and conclusions of law on the record, deprives the findings of fact and conclusions of law of legal authority. Moreover, the instant case was resolved on a summary judgment basis. This

difference distinguishes the present case from the various cases cited by Petitioner to demonstrate conflict. Herein the successor judge considered the transcripts as supporting affidavits and then ruled that the summary judgment was appropriate in that there were no genuine issues as to any material fact. *Bromberg v. Moul*, 275 F.2d 574, 576 (2nd Cir. 1960). The issues decided by the successor judge were legal issues based upon an undisputed factual record.

The cases cited by Petitioner to demonstrate conflict are distinguishable in that none of them involved facts similar to the facts at bar. In *Whalen v. Ford Motor Credit Company*, 684 F.2d 272 (4th Cir. 1982), *cert. den.*, 459 US 910 (1982), the original judge died during the taking of evidence in a jury trial. Herein, there was no jury and the judge died only after the proffer of evidence in support of a motion for relief from the judgment announced by the court. In both *Brennan v. Grisso*, 198 F.2d 532 (D.C.Cir. 1952) and *Arrow-Hart, Inc. v. Phillip Carey Company*, 552 F.2d 711 (6th Cir. 1977), findings of fact and conclusions of law had not been stated orally and recorded in open court following the close of evidence. Most important, however, is the fact that the instant case was resolved by summary judgment.

Herein, the original trial judge filed his findings of fact and conclusions of law by stating the same in open court and on the record. The successor judge was within his power and authority to consider the entire testimony as being affidavits submitted on motion for summary judgment and in the absence of any disputed factual issues, entering judgment accordingly. The subsequent

Rule 60(b) motions were within the authority of the successor judge to decide. Nothing offered by the Petitioner herein contravenes that conclusion nor do any of the cases cited by Petitioner conflict or otherwise disagree with that result.

The issue raised in the present case is unlikely to recur and is too narrow to warrant further review by this court. A review of the procedural posture of this case demonstrates the unusual course of proceedings and the uniqueness of this particular litigation. The only real questions that Petitioner raises turn upon the particular facts of this case and are of interest only to the parties herein. The case has received the careful attention of two district judges and the review of the Court of Appeals. The issues simply do not justify a further review by this Honorable Court.

II. WHETHER, AT THE TIME THE CONSTRUCTIVE TRUST AROSE, AN ESTATE BY THE ENTIRETIES EXISTED.

The Petitioner's argument on this issue continues to ignore the facts and misses the entire point of the lower court's ruling. A review of the decisions below reveals quite clearly that the courts relied upon the critical fact that Petitioner Jay Nell Locke terminated and extinguished her entirety interest in the property when she executed and delivered her deed to the Coniglios. A voluntary destruction of an entirety interest does not violate the rule that neither spouse may sell, forfeit or encumber any part of the estate without the consent of the other. See, *Smith v. Hindery*, 454 S.2d 663 (Fla. 1st DCA 1984). The various cases cited by Petitioner simply do

no address a situation in which the complaining spouse has voluntarily terminated the entirety estate. When the Petitioner chose to voluntarily terminate her entirety estate, the estate lost its inherent protections and restrictions on alienability. Petitioner cannot now be heard to complain about the attachment of the beneficial interest of Respondent MESA.

The Petitioner has not shown any reason to open or attempt to reverse the decision and judgment of the Fifth Circuit Court of Appeals in the appeal of the decision in the 75-28 case. The entirety interests of the Lockes were addressed in that litigation and appeal and were rejected. The District Court below in the 82-85 case necessarily considered whether any good reason had been shown to disregard the earlier decision of the Circuit Court of Appeals. The District Court correctly found that Petitioner Jay Nell Locke's delay in seeking to challenge that judgment did not commend her position to any equity. In reaching this conclusion, the trial court necessarily afforded consideration to the merits of Petitioner's claim.

The imposition of the constructive trust did not affect Petitioner Jay Nell Locke's original entirety interest because she had voluntarily extinguished that interest and conveyed it to another party. Jay Nell Locke seeks to expand the rights obtained by a subsequent deed to include the beneficial interest of Mesa arising out of an earlier fraudulent transaction. The Petitioner has not cited any facts nor any case law which would allow her subsequently acquired interest to expand to include a beneficial interest arising prior to the creation of her interest.

As in the first issue raised by Petitioner, the points involved herein are unlikely to recur. The issues were created by a very unique series of acts which are unlikely to recur. The issues turn upon the unique facts of this case and are of interest only to these parties. Nothing the Petitioner has shown justifies review by this Honorable Court.

CONCLUSION

The decisions of the courts below herein turn upon the specific facts of this case. The decisions in this case will affect few others, if any, beyond the immediate litigants. Petitioner has failed to show that this case involves principles of importance to the public as distinguished from the instant parties. Nothing the Petitioner has shown demonstrates any special or important reason which would justify granting a petition for certiorari herein. Respondent respectfully requests entry of an order denying the petition for certiorari.

Respectfully submitted,

Stephen A. Hould
Hould, Donnelly & Westling
220 E. Forsyth Street
Jacksonville, FL 32202
(904) 356-2341